In the United States Circuit Court of Appeals

For the Ninth Circuit

SOCIETE NOUVELLE D'ARMEMENT,
Plaintiff in Error,
vs.
J. R. BARNABY, Defendant in Error.

Upon Writ of Error to the United States District Court for the Western District of Washington, Northern Division.

REPLY BRIEF OF PLAINTIFF IN ERROR.

JAMES KIEFER,
Attorney for Plaintiff in Error.
Suite 327 Colman Bldg.,
Seattle, Wash.

Met. Press

In the United States Circuit Court of Appeals

For the Ninth Circuit

SOCIETE NOUVELLE D'ARMEMENT,
Plaintiff in Error,
vs.
J. R. BARNABY, Defendant in Error.

Upon Writ of Error to the United States District Court for the Western District of Washington, Northern Division.

REPLY BRIEF OF PLAINTIFF IN ERROR.

I.

The first point made by the defendant in error is not well taken.

Counsel has examined the record in the cases in this circuit cited in the brief of the defendant in error upon this point and finds that in not one of them was there any suggestion or hint or a request for a finding on behalf of the plaintiff in error. At page 65 of the record in this case we find a plain challenge to the

evidence. While a formal motion was not made, we submit that the record plainly shows that the point was made that under all the evidence in the case defendant (plaintiff in error) was entitled to a judgment. This we submit is sufficient under all the cases cited by the defendant in error in his brief. No formal or set language is required to constitute a challenge to the evidence. It is sufficient if the plaintiff in error called to the attention of the trial court the point that the evidence is insufficient to justify recovery by his adversary. The holdings in all the cases amount to this, that there must be a request for a finding for the plaintiff in error. The findings of a trial court are mixed findings of law and fact, and we respectfully contend that if the plaintiff in error makes the point in the trial court that he is entitled to judgment, the appellate court must review the sufficiency of the evidence to sustain the recovery. We submit that the language found on page 65 of the record in this case, "that in any event under all the evidence in the case the defendant was entitled to judgment" satisfies this requirement.

Bunday vs. Huntington, 224 Fed. 47.

A reading of the opinion of the trial court cannot fail to convince this court that the trial court treated this request of the defendant (plaintiff in error) as a

challenge to the evidence, and disposed of the case upon that theory. In recent years the courts have departed from the ancient rule that form is everything. It is not necessary that there should be a formal challenge in any set words.

II.

If we understand the counsel for defendant in error, his position is this, that because plaintiff in error failed to secure an immediate ruling by the court upon its objection to the introduction of any testimony to support the complaint (Tr. p. 24) there can now be no review of this matter. We have always understood that an exception imported a ruling. It is in the very nature and essence of an exception that there be a ruling of the court. How can counsel except to non-action? It is to the affirmative action of the court that exception is saved. So long as the ruling upon this objection remained in the breast of the court, we could not except to it, nor could we incorporate in the bill of exceptions any exception to the ruling because it was not made at the trial. We did except at the very earliest opportunity, namely, when the general finding was made. There never was any ruling on this objection except as it inheres in the general finding, and to this it is conceded we did properly except. We respectfully submit that the action of the court sub-

sequent to the closing of the trial is not a part of the bill of exceptions.

3 Cyc, 28.

2 Cyc, 1068.

Wesson vs. Saline County, 73 Fed. 917.

Aetna Insurance Co. vs. Boon, 95 U. S. 117, 24 L. ed. 395.

III.

Counsel is entirely in error in his comment upon the ruling of the Supreme Court of the State of Washington in the case of *Schubach vs. Redelsheimer's Executors.* The court held directly the opposite of what Counsel stated on page 18 of the brief of the defendant in error. The court held that the executor of a non-intervention will need not present his claim to the court for allowance; that the court was without jurisdiction to pass upon it, and that it was the duty of a co-executor to pass upon it; and the court did sanction and sustain a suit brought by the assignee of an executor against both executors upon a claim rejected by a co-executor.

IV.

We submit that our 9th and 10th assignments of error should be sustained. In the brief of the defendant in error it is virtually admitted that the court erred in admitting this evidence over the objection and exception of the plaintiff in error and begs the question by

assuming that it was not prejudicial. In view of the liberal award, clearly it is prejudicial. Counsel for the defendant in error very strenuously conceded throughout his brief that the finding of fact of the trial court in the case tried in a Federal court upon waiver of a jury has all the effect of a verdict of a jury. It logically follows that in all respects the trial court sitting without a jury must be deemed to be in law the jury. The erroneous admission of testimony before a jury, counsel concedes, is always erroneous; and we submit therefore, that it should be held by the court that the admission of this testimony was erroneous, and upon this ground, if upon no other, the judgment should be reversed.

It is an absurdity to say that the plaintiff in error was not prejudiced by the admission of this evidence. It is not to be presumed that the trial court admitted evidence with the deliberate intention of not considering it in making up his findings and award. It would border upon the ridiculous for a trial court, sitting without a jury, to admit evidence of this kind and disregard it in making up his findings. The attention of the trial court had been challenged by the objections and exceptions of the plaintiff in error, and most certainly he intended to consider this evidence when he admitted it, and he did consider it. It is not urged

and cannot be urged that there was any other evidence of the same facts.

V.

On page 33 of the brief of defendant in error the assertion is made that we saved no exception to the evidence of the witness Gorham. The court should bear in mind the manner in which the testimony of the witness Gorham was given. It will appear at page 63 of the record that no questions were asked of the witness. He made a statement without any questions being previously asked. As soon as it became evident that the witness was going to testify to the consultation with his client, and the advice given by him, objection was interposed to all of it. We could not object when no questions were asked, and it is plainly apparent from the state of the record that the objection went to all of the testimony of the witness. The trial court so understood and counsel for defendant in error so understood it, and we submit that owing to the manner in which the testimony was given, the objection should be held to go to all of the testimony of the witness.

VI.

Finally we contend that all the evidence which was offered by the defendant in error to show that the services herein sued for were not included in the suit in the Superior Court was improperly admitted over the objection and exception of the plaintiff in error,

and Counsel for defendant in error admits this in his brief. That is, he admits that it was admitted over the objection and exception of the plaintiff in error. This being so, we submit that we have shown in our brief that the stipulation appearing at pages 23 and 56 of the record to the effect that "ship's broker" and "ship's agent" should mean the same thing, makes this suit one for services as a ship's broker rendered within a period for which the defendant in error had already recovered a judgment. It appearing to the court that upon a contract of oral employment the defendant in error had rendered certain services as a "ship's broker" or "ship's agent" (it is immaterial which) during a period of years and had sued and recovered for these services, he could not show as against our plea of former recovery that in fact he sued for other and different services in the first action. He is absolutely bound by the record as he has made it, and we submit that all of this testimony must come out. With this testimony out the only evidence left in the case shows conclusively that the defendant in error had already recovered.

We reiterate our position as stated in the concluding page of our opening brief.

Respectfully submitted,

JAMES KIEFER,
Attorney for Plaintiff in Error.